COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1354

ANNA M. LEONE

vs.

EDWARD T. PATTEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The former husband, Edward T. Patten (husband), appeals from a judgment dismissing his complaint for modification of his alimony obligation to the former wife, Anna M. Leone (wife). On appeal, the husband claims the judge erred in concluding that he had failed to establish facts necessary to the application of the doctrine of countervailing equities. He additionally asserts error in the denial of his request to introduce "new" evidence that the wife fraudulently misrepresented her income at the time of the divorce, claiming the request should have been allowed since he first discovered the evidence during the course of the modification proceedings, and the wife's alleged fraud, if proved, would bar the enforcement of his alimony obligation. We affirm.

1. Background. A judgment of divorce entered in 2005. It provided that the 2005 separation agreement (2005 agreement) was "incorporated but not merged . . . and shall survive and remain as [an] independent contract[]," with the exception of provisions related to the child, which merged and did not survive. On February 10, 2014, the husband filed a complaint for modification seeking to terminate his alimony obligation, claiming that his self-employment income had decreased significantly since the divorce, and terminating alimony was necessary to avoid insolvency. The husband claimed he had paid substantial sums on behalf of the parties' child, while the wife had failed to pay her share of the child's college expenses. The husband also claimed there had been a significant increase in the wife's income, and he unsuccessfully sought to introduce evidence that she had fraudulently misrepresented her income at the time of the divorce.

On July 28, 2016, the judge dismissed the husband's complaint, finding no countervailing equities warranting the termination of alimony. The judge found only a modest decline in the husband's self-employment income between 2005 and 2012. She rejected the husband's assertion that his annual income had dropped by more than fifty percent since 2012, noting that the husband failed to file tax returns for 2013 and 2014, and finding that his testimony regarding his finances lacked

credibility. The judge also rejected the husband's argument that the wife's failure to pay her share of the child's college expenses constituted a countervailing equity requiring the termination of alimony, finding that neither party was obligated to pay for the child's college expenses because there was no joint consultation and agreement regarding his choice of college.

2. Countervailing equities. a. Diminished income. The husband contends that he introduced clear evidence of countervailing equities and he is thus entitled to a modification of the 2005 agreement. "[F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Mason v. Coleman, 447 Mass. 177, 186 (2006), quoting Mass. R. Dom. Rel. P. 52 (a). This court will not set aside the trial judge's findings absent a "firm conviction that a mistake has been committed." Id., quoting New England Canteen Serv., Inc. v. Ashley, 372 Mass. 671, 675 (1977).

Absent a suggestion that the parties' 2005 agreement was the product of fraud or coercion, or that it was not fair and reasonable at the time of the divorce judgment, it "should be specifically enforced, absent countervailing equities." Knox v. Remick, 371 Mass. 433, 437 (1976). Countervailing equities

include situations where "one spouse is or will become a public charge," or where there has been a failure to comply with the agreement. Id. Countervailing equities are "more than a material change of circumstances." Larson v. Larson, 37 Mass. App. Ct. 106, 108 (1994). To be entitled to relief on this ground, the husband's complaint must support an inference that (1) the husband is or will become a public charge, (2) the wife has not complied with the provisions of the 2005 agreement, or (3) there exists some other countervailing equity "at least as compelling as these two grounds." Stansel v. Stansel, 385 Mass. 510, 515-516 (1982). See Knox, 371 Mass. at 437.

The husband claims that his income has been severely reduced, that he, his current spouse, and her three children by a previous marriage are "virtually bankrupt," and that they will become public charges unless the 2005 agreement is modified. The "public charge" prong is narrowly interpreted as a financial deterioration that renders a "spouse unable to meet basic needs, so that public support is likely to be required in behalf of the dependent spouse and children in turn dependent on her or him." McCarthy v. McCarthy, 36 Mass. App. Ct. 490, 494 (1994). A reduction of income alone does not establish a risk of becoming a public charge. See Hayes v. Lichtenberg, 422 Mass. 1005, 1006 (1996). See also Larson, 37 Mass. App. Ct. at 108-109. Compare O'Brien v. O'Brien, 416 Mass. 477, 479 (1993) (where trial judge

found that wife was unemployed due to health problems and thus became a "public charge").

Here, the judge found that when the parties divorced in 2005, the husband earned $128,960 per year as a self-employed attorney. The judge also found that the husband's two-year average income for 2013 and 2014 was $101,829. Although the husband continued working as an attorney, he claimed a substantially diminished income. However, he did not file tax returns in 2013 or 2014, provide an explanation for his failure to file, or provide other reliable financial records. The judge did not credit his claim of poverty. We discern no error in the judge's evaluation of the husband's testimony. See, e.g., A.H. v. M.P., 447 Mass. 828, 838 (2006) (trial judge's prerogative to weigh evidence).

b. Education expenses. The husband contends that his claim of countervailing equities is also supported by the wife's failure to pay for one-half of their son's higher education expenses. The 2005 agreement provided that the child's college expenses "shall be divided equally between the parties," "the choice of colleges . . . shall be made on the basis of joint consultation," and "[n]either party shall make any commitment to any educational institution on behalf of the child without first notifying and obtaining the other party's written approval."

The judge credited the wife's testimony that she neither approved of the child's college attendance nor had the financial means to pay for half of the college expenses. The wife testified that she drove the child to and from Fordham University, and visited the child at the University of Colorado. Notwithstanding the husband's claims to the contrary, these actions do not comprise conclusive evidence of a mutual agreement between the parents regarding the child's initial choice to attend college or subsequent choice of colleges. Nor were the wife's attempts to discourage the child from applying to college an unreasonable withholding of approval. Compare Feinstein v. Feinstein, 95 Mass. App. Ct. 230, 236-237 (2019). It was for the judge, not an appellate court, to weigh the evidence. See, e.g., A.H., 447 Mass. at 838.

c. Fraud. The husband additionally contends that his claim of countervailing equities is supported by "new" evidence that the wife fraudulently misrepresented her income at the time of the divorce, and asserts error in the denial of his pretrial motion, pursuant to Mass. R. Dom. Rel. P. 16, to introduce the evidence. Although the husband raised the claim of fraud by means of a pretrial motion in limine, the judge exercised her discretion to consider the claim as if it had been brought pursuant to Mass. R. Dom. Rel. P. 60 (b) (3), the proper avenue to raise this claim. On appeal, the husband asserts that his

motion should have been allowed pursuant to Mass. R. Dom. Rel. P. 60 (b) (6) because he first discovered the alleged fraud during the course of the modification proceedings, and, if proved, the wife's alleged fraud would bar the enforcement of his alimony obligation.

"A motion for relief under rule 60(b) is directed to the sound discretion of the motion judge, and we review the judge's ruling for abuse of discretion." Dilanian v. Dilanian, 94 Mass. App. Ct. 505, 515 (2018), quoting Ulin v. Polansky, 83 Mass. App. Ct. 303, 308 (2013). We discern no abuse of discretion here.

"For reasons (1), (2), and (3) [of rule 60 (b)], . . . the motion must be made within one year following the entry of judgment. This one-year time limit cannot be extended." Chavoor v. Lewis, 383 Mass. 801, 803 (1981). Under the rule, therefore, the judgment was not subject to modification on the basis of alleged fraud by the wife. See Mass. R. Dom. Rel. P. 60 (b). "It is settled that a decree is not open to attack simply because of false testimony or an inadequate presentation of the case at the hearing." Coughlin v. Coughlin, 312 Mass. 452, 454 (1942). The possibility that a party perjures himself is a "common hazard of the adversary process with which litigants are equipped to deal through discovery and cross-examination." Sahin v. Sahin, 435 Mass. 396, 402 (2001),

quoting Geo. P. Reintjes Co. v. Riley Stoker Corp., 71 F.3d 44, 49 (1st Cir. 1995).

The record before us provides no support for the husband's claim of "compelling or extraordinary circumstances" warranting relief under Mass. R. Dom. Rel. P. 60 (b) (6). See Freitas v. Freitas, 26 Mass. App. Ct. 196, 198 (1988). In the 2005 agreement, both parties stipulated that they "agreed and understood" that "they have been afforded the opportunity for full discovery of any and all pertinent data with regard to the income, assets, liabilities and expenses of the other." The husband asserts that he "was entitled to rely on the representations" made by the wife regarding her income, and advances no claim that the alleged fraud could not have been discovered through ordinary and reasonable diligence in the divorce proceeding. See Mass. R. Dom. Rel. P. 26; Mass. R. Dom. Rel. P. 30; Sahin, 435 Mass. at 402. Even if the husband had properly raised the claim in the Probate and Family Court, there

is simply no support for a conclusion of extraordinary circumstances. See Sahin, supra.

Judgment of dismissal affirmed.

By the Court (Sullivan, Massing & Lemire, JJ.[1]),

Joseph F. Stanton

Clerk

Entered: July 31, 2019.

[1] The panelists are listed in order of seniority.